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SUMMARY RECORD OF THE 1492nd MEETING

Held at Headquarters, New York,
on Friday, 29 March 1996, at 10 a.m.

Chairman: Mr. AGUILAR

later: Mr. EL-SHAFEI
(Vice-Chairman)

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The meeting was called to order at 10.20 a.m.

GENERAL COMMENTS OF THE COMMITTEE

Draft general comment on article 25 of the Covenant (CCPR/C/53/CRP.1)

Paragraph 21

1. Ms. EVATT said that agreement had previously been reached on replacing the first sentence by the following: "Subparagraph (c) deals with the right and opportunity of citizens to have access to public service on general terms of equality. It covers appointment, promotion and dismissal in respect of public service positions such as the career civil service, the military, police and security services". That wording was intended to cover the point raised previously that there was a need to distinguish between political positions, such as personal advisers, on the one hand, and positions which must be protected from political pressure, on the other. She also proposed the deletion of the last part of the penultimate sentence, reading "but no one ... discriminatory grounds".

2. Thus worded the paragraph would expand on article 25 (c) of the Covenant, with an emphasis on merit and equal opportunity and freedom from discrimination on the ground of political opinion.

3. Mr. KLEIN said that he had difficulties with the fourth sentence of the original draft of paragraph 21. In Germany, public officials at the highest level were subject to dismissal when the Government changed, with payment of monetary compensation. It was of obvious importance for the Government and the senior levels of the civil service to share the same political views in the interest of administering the country. Great care should be taken in respect of the wording proposed to replace the original first sentence. The last sentence of paragraph 21 should also refer to judicial protection.

4. Mr. BRUNI CELLI said that in some national systems express mention was made of the situation of officials in senior positions linked to the Administration. Perhaps that point should be taken into account in the general comment, since there was no doubt that at senior levels the Government must enjoy confidence in its officials.

5. Mr. BÁN noted that the amended first sentence referred to "appointment, promotion and dismissal", whereas the last original sentence also referred to "suspension" and "removal"; consistent language should be used. He had doubts regarding the use of the word "merit", since in many countries public service included such modest occupations as clerical workers in post offices, where the concept seemed inappropriate. Use of the term also suggested that someone deserved to be appointed on political or other grounds. The question of political opinion had previously been tackled with reference to paragraph 14, where the Committee had taken the position that it should not be used as a ground to deprive any person of the right to stand for election. That same principle could be applied in respect of paragraph 21.

6. Mr. FRANCIS said that the approach taken in Jamaica was for new Governments to transfer to different ministries senior officials thought to be politically biased, but their tenure was maintained. Any attempt to influence a minister as a result of political affiliation would be countered by the minister's advisers.

7. Mr. BHAGWATI said that there were some positions in the public service that were not of such importance that there was any need to insist on appointment exclusively on merit. The third sentence of the original draft could thus be worded "Basing the public service on equal opportunity ...". While it would be appropriate in general to ensure that there was no discrimination on the ground of political opinion, there were positions where political opinion matched, for example, that of Attorney-General. Some clarification was required.

8. Mr. KLEIN said that in view of the differences between civil service structures in different countries it would be dangerous to approach the issue of political opinion narrowly. In the German system it would be simply impossible to keep a Secretary of State, the highest level of the civil service, if his or her political views differed from those of a new minister, neither could such a person simply be transferred to a different ministry. Thus, in Germany, the two highest levels were referred to as "political" civil servants. While the independence of the civil service was guaranteed for all lower ranks, such senior officials were subject to dismissal on political grounds. He did not support deletion of the word "merit", as the concept was essential to any public service.

9. Mr. El-Shafei, Vice-Chairman, took the Chair.

10. Mr. LALLAH said that if appointing authorities used a criterion other than merit, it would amount to arbitrariness. Since the Covenant required that rights in that regard should be subject to judicial review, the courts must know what the criteria were. It would be difficult to devise any suitable criterion other than merit, and the person with the greatest merit should necessarily be appointed. Nevertheless, appointments such as Attorney-General were political by their very nature. In any event the Committee could not, in a general comment, diminish the foundation of article 25; the Committee simply could not say that it was possible to discriminate on the basis of political opinion when article 25 said the contrary. In Mauritius even the most senior civil servants were supposed to serve in an apolitical capacity, even though they were entitled to hold political opinions, a right protected by both the Constitution and the Covenant.

11. Mr. KRETZMER agreed that the Committee could not possibly include in a general comment a statement that was inconsistent with an article of the Covenant. The aim of the general comment was to interpret the Covenant, and the Committee must not go beyond that by giving a general view of what the best form of government was, that clearly being beyond its mandate. The Committee should also bear in mind that its general comments applied to some 140 countries, each with its own conceptions of public service and of which officials should change on the accession of a new Government. Given that the Committee, in draft paragraph 22, supported affirmative action, with respect to paragraph 21 perhaps merit was not the primary consideration in all cases. The Committee would do better simply to delete the sentences referring to merit and to discrimination

on the ground of political opinion, since the earlier sentences stated that the criteria must be reasonable, objective and non-discriminatory. No further elaboration was necessary.

12. Mr. FRANCIS said that merit was an essential component in the appointment and evaluation of public servants; however, he was also in favour of equal opportunity policies, as referred to in paragraph 22. It should be borne in mind that political appointees and civil servants could not be put in the same category for that purpose. Each country should find its own way of categorizing public employees in compliance with article 25 of the Covenant.

13. Mr. BHAGWATI agreed that the concept of merit was very important. However, there was a danger that the content of paragraph 22, regarding affirmative measures might conflict with the principle of appointment and evaluation on a strict merit basis.

14. He suggested that the third and fourth sentences of paragraph 21 should be replaced with some wording to the effect that it was necessary, in order to preserve the public service from political interference or pressures, that it should be based on merit and equal opportunities, with security of tenure, subject to the exceptions set out in paragraph 22; and that it was of particular importance to ensure that there was no discrimination on the ground of the political opinion, except where the public service position was of a political character.

15. Ms. EVATT agreed with Mr. Bán that the wording of the paragraph should be consistent, referring to suspension and removal as well as appointment, promotion and dismissal. However, she could not agree with Mr. Kretzmer that the second and third sentences of the paragraph should simply be removed, since they contained statements which were of considerable importance, concerning freedom from political interference and the prevention of discrimination on ground of political opinion. The latter was the most sensitive issue dealt with in paragraph 21 and the Committee could not be silent on it.

16. The beginning of the third sentence should perhaps be reworded to read "Basing public service on equal opportunity and on general principles of merit ...". She agreed with Mr. Bhagwati's suggestion that reference should be made to the exceptions provided for in paragraph 22. She did not see affirmative action policies as being necessarily inconsistent with the merit principle; people who benefited from affirmative action policies still had to be qualified.

17. The question of political opinion, dealt with in the fourth sentence, was a much more difficult issue. Clearly, there were sensitive positions of a political nature in public service, and it was generally agreed that in such cases Governments should be given some leeway to make choices on political grounds. She suggested that the sentence might be amended to the effect that political opinion should not as a general rule be a ground of discrimination, and that if necessary the words "except where the position is of a political character" could be added.

18. Mr. KLEIN suggested that the end of the final sentence of paragraph 21 should be amended to the effect that State reports should also describe the judicial protection public servants or officials might have in that respect.

19. The CHAIRMAN said that a new draft could be prepared for consideration at the Committee's next meeting.

20. Mr. LALLAH said that he would support the use of the expression "general principles of merit" in the third sentence, and that it was important to retain the reference to the ground of political opinion in the fourth sentence. He supported Mr. Klein's suggestions regarding the wording of the final sentence of the paragraph.

21. Mr. BHAGWATI supported the suggestion to use the expression "equal opportunity and general principles of merit" in the third sentence, as well as the requirement for State reports to describe the judicial protection available to public servants. However, the wording concerning political opinion would be too broad unless it was qualified in some way. He suggested that the words "political opinion" should be followed by "except where the public service position is of a political character".

22. Mr. FRANCIS said that it would be wrong to water down the sentence concerning political opinion; the role of civil servants was administrative, not political.

23. Ms. EVATT proposed that the Committee should proceed to discuss the next paragraph. Before the next meeting, a new draft would be produced, taking account of the various suggestions that had been made.

Paragraph 22

24. Ms. EVATT proposed that the first sentence of the paragraph should be amended to read: "Affirmative measures should be taken to ensure that citizens belonging to parts of the population which are under-represented in public service, for example, women, minorities and indigenous people, have an equal opportunity to have access to public service". The second sentence of the paragraph would remain unchanged.

25. Lord COLVILLE said that he had very serious reservations about the entire paragraph; he did not see how it could be consistent with article 26 of the Covenant. If affirmative measures were allowed in the appointment of public servants, they must not take an exclusive role in such a way that those who did not belong to under-represented minorities were excluded. He suggested that the word "reasonable" should be added before "affirmative measures", to avoid enabling public authorities to take extreme positions, discriminating against candidates from non-minority groups who were equally meritorious and should also be considered.

26. Mr. BRUNI CELLI agreed that there was a danger of encouraging quota systems, which conflicted with the principle of equal access contained in the second sentence of the paragraph. The concept of "representation" of different parts of the population should be reviewed very carefully.

27. Mrs. CHANET shared the concerns expressed by the two previous speakers regarding discrimination and quota systems.

28. Mr. KLEIN said that affirmative measures were sometimes necessary to ensure equal opportunity for under-represented groups. However, he agreed with Ms. Evatt that such measures should not detract from the requirement of merit, and that principle should be reflected in paragraph 22. The meaning of "under-representation" should be defined more clearly.

29. Mr. LALLAH said that he strongly supported affirmative action in appropriate circumstances, but difficulties always arose when an attempt was made to incorporate it in a general rule, and the problem would be particularly complex in countries where many different minority groups existed. There could also be conflicts with other international instruments and with article 26 of the Covenant. The matter of affirmative measures would be most appropriately dealt with in individual cases.

30. Mr. BHAGWATI said that he himself was an advocate of affirmative action, a policy which in India had been applied systematically and upheld by the Supreme Court. Equality of opportunity consisted in having regard to the past and continuing handicaps of a disadvantaged minority or majority. Where de facto inequality existed, the imposition of de jure equality would only accentuate it. De facto equality for all could be achieved in either of two ways: by giving advantages to the more vulnerable groups, or by placing handicaps in the way of the more fortunate. Affirmative action did both. The text, however, was perhaps worded too broadly and he proposed amending the opening sentence to read: "Reasonable affirmative measures may be taken in appropriate cases to ensure that citizens belonging to under-represented parts of the population have an equal opportunity to have access to public service." That would allow the authorities some flexibility.

31. Mr. KRETZMER said that he would prefer something stronger than "may be taken", which merely suggested that affirmative action was not inconsistent with the equality clause. The Committee was trying to give direction to States.

32. Mr. FRANCIS said that he supported Mr. Bhagwati's amendment, but that he disagreed with Lord Colville. Article 26 should be read in conjunction with article 25 and if that was done, article 25 satisfied article 26 in respect of equality before the law and the idea of "one man, one vote".

33. Ms. EVATT agreed that the original wording was perhaps too bold. She therefore would support Mr. Bhagwati's amendment but would amend the second part of the sentence as well, to read: "...to ensure that members of all sectors of society have equal access to public service".

34. Mr. KLEIN, noting that affirmative action usually referred to women and generally recognized minorities, said that the term "all sectors of society" was much too broad and could encompass any group - homosexuals, for instance, or persons of different beliefs - who could claim to be under-represented.

35. Ms. EVATT, supported by Mr. BHAGWATI, concurred, and suggested replacing the phrase "members of all sectors of society" by the phrase "women and minorities".

36. Mrs. CHANET said that then the problem arose of what specific minorities were being referred to.

37. Mr. LALLAH said that he was not sure it was just a question of wording. He felt there was substantive disagreement among members, who were not clear in their own minds about the whole question. Perhaps the term "minority groups" might be preferable to "minorities". Indigenous peoples or persons of mixed race, for instance, might be majorities but might still be denied their rights. The key was to ensure equal opportunity of access. Equality did not mean that there could not be differentiation on reasonable criteria.

38. Ms. EVATT observed that the point addressed in paragraph 23 was important, because, especially in the area of public service, the State had power to act and must do its utmost. She proposed revising the second part of the sentence to read: "to ensure that the right of equal access to public service is effective for all citizens". That affirmed the main point without raising the question of quotas or other problems.

39. Mr. LALLAH asked whether one would then still speak of "women and minority groups" in the last sentence of the paragraph. He believed that the solution had been to encompass all kinds of minorities and there, indigenous groups had been left out.

40. Ms. EVATT, supported by Mr. BHAGWATI, said that the last sentence was simply asking for information in the usual terms used by the Committee. However, if it was a problem, the phrase, "the percentage of women and minority groups in public service positions" could be deleted, so that the third sentence would read: "Reports should indicate how the requirement for equal access is met and whether affirmative measures have been introduced, and if so, to what extent".

41. Lord COLVILLE suggested that the words "to public service" should be added after the word "access".

42. The CHAIRMAN said that he took it the Committee wished to adopt paragraph 22, as amended.

43. Mrs. CHANET said that she still did not agree in principle, so there was no consensus. The paragraph should be bracketed, for further discussion.

44. It was so decided.

Paragraph 23

45. Ms. EVATT said that paragraph 23 concerned the judiciary, considered as a special aspect of public service, since it exercised power while remaining separate from and independent of the political process and being accountable primarily to the constitution and laws of a State. The third sentence of the

paragraph, stating that the judiciary must remain independent of interference or control by other arms of government conveyed the central idea. The paragraph then went on to deal with the conditions of service and the discipline and dismissal of judges. The next two sentences referred to the three methods of appointment of judges, and the paragraph concluded by stating that whatever method applied, access to the judiciary should be non-discriminatory.

46. There had been difficulty in deciding where to locate the judiciary in the context of article 25, but it had finally been decided to place it under subparagraph (c) regarding equal access to public service.

47. Mr. BRUNI CELLI said that the paragraph should be streamlined, and should state simply, without analysing the relation to the political process or to other branches of government, that the judiciary was a special aspect of public service primarily accountable to the constitution and laws; that its independence must be safeguarded by appropriate conditions of service and disciplinary measures; and, without going into the three methods of appointment of judges, that whatever method applied, access to the judiciary should be non-discriminatory.

48. Mr. BÁN said that the placement of paragraph 23 was probably acceptable, but that its relationship to paragraph 21 was unclear. He was unsure if the general requirements for public service put forward in paragraph 21 were automatically applicable to paragraph 23 or if they were only applicable unless otherwise stipulated in paragraph 23. Most of the criteria did seem to apply in paragraph 23, although he was concerned that the most important of all - security of tenure - had not been adequately stressed.

49. Mrs. CHANET said that she had serious reservations about paragraph 23, perhaps because she was a member of the judiciary in a country where judges were not considered part of the public service. Overall, the paragraph seemed to reflect a point of view that did not apply to some judicial systems. Moreover, it mixed up a number of issues that had no bearing on equality of access to public service, for example the independence of the judiciary. The observation that the judiciary was a special aspect of public service and the references to remuneration and conditions of service also confused the issue and had little to do with conditions of access to public service. Paragraph 21 already covered such criteria.

50. Mr. PRADO VALLEJO endorsed Mrs. Chanet's view that the administration of justice was not a public service. The judiciary was part of government. In his view, the phrase "special aspect" in the first sentence of paragraph 23 had no meaning; if anything, the judiciary was a special organ or branch of government. The remark in the second sentence that the judiciary was guardian of the rule of law was also misleading. The administration of justice meant the implementation of laws. The Congress and the Government of a country were the entities entrusted with safeguarding the rule of law. On the other hand, he did agree that the independence of the judiciary and its freedom from outside interference were of fundamental importance. In that connection, he reminded the Committee that judges in some countries received very low salaries. In order to ensure their continued independence from outside pressures, it might be preferable to talk about providing reasonable and fair remuneration rather than protecting

salaries and conditions of service. On balance, he thought it better to delete the list of methods by which judges could be appointed since there were significant differences between systems around the world; a reference to "whatever system" would suffice.

51. Mr. BHAGWATI agreed that judges were public service functionaries rather than public servants in the narrower sense. In fact the issues raised by paragraph 23 seemed to fall more naturally within the scope of article 14 of the Covenant. Wherever the Committee ultimately decided to place the remarks in paragraph 23, it would be important to state that the judiciary should be independent and should enforce the rule of law, that it should be accountable to the constitution and the laws, and that judges' salaries should be adequate with respect to the standard of living and their status. Judges should enjoy fair and just conditions of service and security of tenure. Appointments to the judiciary should not be subject to the political process and should be on the basis of merit. The Committee might also refer to the principles on the independence of the judiciary that had been adopted by the United Nations General Assembly.

52. Mr. FRANCIS said that members of the judiciary were public officials in the same way that politicians were. Article 25 of the Covenant expressly referred to "every citizen" and "public service", so there was no escaping the fact that the judiciary also fell within the scope of the article. He suggested that those members of the Committee who were practising judges should form a drafting group to formulate a more acceptable wording, bearing in mind the remarks made by Mr. Bruni Celli.

53. Mr. KRETZMER wondered whether the difficulties which Mrs. Chanet and Mr. Prado Vallejo had with the text of paragraph 23 might not be semantic in nature, since there was a clear distinction between "public service" in general and "the public service" in particular. In that respect the judiciary was indeed a special aspect of public service, but he indicated that any remarks about the independence of the judiciary were inconsistent with the provisions of article 25 (c) of the Covenant. That article implied that all qualified citizens should enjoy the right of access to judicial posts. He endorsed the proposal made by Mr. Francis, on condition that the provisions of article 25 (c), were strictly borne in mind.

54. Mr. KLEIN asked for clarification as to the distinction between public service and the civil service, bearing in mind that the previous paragraphs of article 25 had clearly identified specific instances of public service.

55. Lord COLVILLE endorsed Mr. Bhagwati's comment that the points raised in paragraph 23 belonged more properly within the scope of article 14 of the Covenant. In addition, the Committee's draft general comment in paragraph 13 covered the same points. Commenting on Mr. Francis's suggestion to set up a drafting committee, he indicated that the text as it stood would pose a problem of compliance for the United Kingdom authorities since the vast majority of court cases there were dealt with by unpaid lay magistrates.

56. Mrs. CHANET said that the French text of article 25 (c) spoke of "fonctions publiques", which should be interpreted as embracing all aspects of government. The judiciary, like parliament and the office of Head of State, should be dealt with in paragraph 23 only with regard to equality of access to appointments to such posts.

57. Mr. LALLAH said that the emphasis of article 25 of the Covenant was on citizens and their free access to public service in the broadest sense. Any remarks that the Committee chose to make regarding the independence of the judiciary should be reserved for article 14, otherwise States parties may get the wrong message about the thrust of article 25.

58. Ms. EVATT said that there seemed to be a consensus to delete the list of various methods of appointment to the judiciary. Regardless of the method of appointment and how judges fitted into State structures, they should be independent and stand apart from the political process. However, if the Committee wished to single out the judiciary and make observations about its role and function, it would automatically have to confront the issues raised in paragraph 21. In order to avoid any disagreements regarding the special status of the judiciary and what aspects of their functions did or did not fall within the scope of article 25 (c), it would be simpler to withdraw the entire paragraph and take up the issues raised therein in another context.

The meeting rose at 1 p.m.